An Chúirt Uachtarach

The Supreme Court

O'Donnell J
MacMenamin J
Dunne J
Charleton J
Baker J

Supreme Court appeal number: S:AP:IE:2020:000115
[2021] IESC 000
Court of Appeal Record Number: 120/20
[2020] IECA 254
Circuit Criminal Court record no: WHDP 0034 2018

Between

The People (at the suit of the Director of Public Prosecutions)
Prosecutor/Respondent

- and -

Kevin Molloy
Accused/Appellant

Judgment of Mr Justice Peter Charleton delivered on Monday 19 July 2021

1. On 19 May 2020, Kevin Molloy, by occupation a debt collector, but a man with a bad criminal record, was sentenced by Mullingar Circuit Criminal Court in respect of two offences of harassment contrary to s 10 of the Non-Fatal Offences Against the Person Act 1997. This followed guilty pleas on the date of trial and entered after a jury to try the case had been sworn. Kevin Molloy was sentenced to 30 months imprisonment on the first count but the last twelve months thereof were suspended for seven years on conditions; the point of this appeal. The second count was taken into consideration. Key to this appeal is the condition imposed that required that the appellant refrain from engaging in debt collection for the seven year period for which the sentence was suspended. This appeal centres primarily on the validity of this condition. Since a range of authorities as to approaches to sentencing on harassment and offences that are akin have been discussed by counsel both for the Director of Public Prosecutions and for Kevin Molloy, general guidance as to the sentencing bands appropriate to the seriousness of such offences and the criteria upon which an offence may be generally classified by a sentencing judge is also addressed.

Determination granting further appeal

2. In the ordinary way, Kevin Molloy appealed his sentence to the Court of Appeal on the basis that the sentence was excessive, that it failed to take account of exceptional circumstances, that the trial judge had failed to give consideration to the alternatives to a custodial sentence, and that the sentence imposed failed to reflect the circumstances of the case and was unduly severe and unjust. Following the dismissal of this appeal, for reasons detailed below, Kevin Molloy sought leave to appeal to this Court. In the determination granting leave, [2021] IESCDET 1, the following issues were identified as involving matters of general public importance:

> 1. The precedents from Ireland and from other countries on demanding with menaces/harassment/unlawful debt collection cases, conduct in other words which would seriously undermine the sense of safety and security of members of the community, no matter what the purported motive, and how these divide into bands of lenient, ordinary, more serious and most serious bands.
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> 2. Whether s 99(3) of the Criminal Justice Act 2006 in enabling a court to impose conditions for the suspension of a sentence extends beyond the period suspended, here 12 months with the possible imposition extending to 84 months.
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> 3. The extent to which the Constitution or statutory authority enables a criminal sentencing court to regulate the conduct of a convicted person and if so over what period.

3. While Kevin Molloy did not originally, in the application for leave, seek to appeal his sentence, at case management it became clear that, as this Court is required to consider sentencing bands in respect of this genre of case, it should be possible for him to challenge his sentence's severity.

The facts

4. In sentencing cases, the severity of the facts, the culpability of the offender and the harm done to the victim are central considerations in applying an appropriate sentence in accordance with law. Kevin Molloy set up his debt collection agency in 2005, apparently following on unemployment related to the collapse of property values. He was employed to recover a debt which he understood was due by one IC. In his attempts to locate this person, Kevin Molloy sought out and discovered the identity of his partner, a lady called AB, who had an interest in equestrian sport. His offences, reflected in the two counts to which he pleaded guilty, were in harassing AB and her father, JB, the object being to bring IC unlawfully to a state of mind where the debt claimed would be paid. The methodology was criminal. According to the summary of evidence before the sentencing judge, threatening phone calls were made between 7 April and 9 August 2015 which menacingly indicated to JB that he knew where he lived and was watching him. On a call to JB on 7 April 2015, Kevin Molly said that "the situation could get very ugly if not dealt with within 48 hours." He informed this victim that, as regards IC, "they were going to bring him for a drive and kidnap him and sort him out." On 10 April 2015, there was a further call to JB which was missed but this was immediately followed by a text saying: "MULLINGAR CANCELLED. TICK TOCK TICK TOCK. ONLY A MATTER OF TIME." Texts followed which further indicated that he was being watched, asserted that he was as big a fraud as IC, and claimed that he did not love his daughter and that he would be as famous as the Aga Khan.

5. The actions taken by Kevin Molloy against AB began on 25 April 2015 when posters of her and IC were distributed near an equestrian event. These heedlessly claimed involvement with IC in a manner that allegedly was likely to extend to his alleged scams. This information was also disseminated on social media. She received texts indicating that she was being watched, including disturbing communications in the middle of the night.

6. Kevin Molloy's previous convictions were not given in evidence in precise detail before the Circuit Criminal Court. Aside from this case, his most recent conviction was in October 2018 when he was convicted of forgery in relation to the purchase of a house and where his sentence involved community service. In the Court of Appeal, the applicant was described as having a number of convictions for theft and deception, burglary and the use of false instruments for gain. He has had a significant number of convictions under the Road Traffic Acts and one conviction for the unlawful possession of firearms and ammunition.

Sentencing remarks

7. The Circuit Court judge, having heard the evidence and submissions, gave judgment as to sentencing thus:

> Turning to the issue of sentence. Bearing in mind the court's obligation to balance the needs of society against the needs of the victims and the needs of the accused I am satisfied that the offending by Mr. Molloy, given the nature of it, the effect of it and the gravity of it, its motivation and duration, ranks at the upper mid-range for sentencing purposes and does, before mitigation, attract a sentence of four years imprisonment. Taking into account the mitigation I have outlined I am prepared to reduce the sentence to two years and six months. Accordingly I am imposing a sentence of two years and six months imprisonment on count number one. And in order to encourage and foster the continued rehabilitation of the accused I am suspending the final twelve months for a period of seven years on the following conditions:
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> (1) the accused enter into a bond of €500 to keep the peace and be of good behaviour for a period of seven years post-release;
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> (2) that the accused submit himself to supervision by the Probation Service for a period of one year post-release and follow all directions given to him by the Probation Service in dealing with his offending behaviour;
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> (3) that the accused refrain from becoming involved in any debt collection service, either directly or indirectly, for the duration of the suspended sentence; and
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> (4) that the accused have no contact whatsoever, either directly or indirectly, with any of the victims or their families. ….
>
> I am marking count two as proved, taking into consideration.

The Court of Appeal

8. The sentence was appealed to the Court of Appeal, [2020] IECA 254, Edwards, McCarthy, Ní Raifeartaigh JJ, judgment of McCarthy J of 25 September 2020, and the appeal was rejected. On the appeal hearing, counsel for Kevin Molloy submitted that the trial judge erred in characterising the offending behaviour as falling into the 'upper mid-range' and thereafter identifying a headline figure of four years. The Court of Appeal dismissed this submission:

> 14. It seems to us, however, that on any view the trial judge was right in the view he took in identifying the offences as falling "at the upper mid-range". Each case must be decided on its own facts and hence the examples of sentencing for the present class of offences presented in *Doherty* and *Carraher* are just that and do not constitute a comprehensive elaboration on the appropriate levels of sentencing for the present class of case. We think that accordingly the headline sentence of four years' imprisonment cannot be faulted when the maximum is seven. It is plain from the judgment that the most comprehensive consideration was given to all relevant factors either for the purpose of deciding the headline sentence or, thereafter, addressing the issue of mitigation. On any view this must

> be so, especially in a case where the most significant element in mitigation, namely a plea of guilty, was entered only at trial; the judge not only reduced the sentence by one year and six months (which we think was more than generous) but went on thereafter to suspend the last twelve months thereof for the purpose of encouraging rehabilitation. A sentence of one and a half years' actual imprisonment in a case where the appropriate headline sentence was four years is one which adequately reflects, and more than reflects, the factors available in mitigation. It must be emphasised too, in this context, that one is dealing with two offences which are quite separate and that the sentence in question effectively is one punishing both when, indeed, in principle the judge might well have considered the imposition of consecutive sentences.

9. It was further contended on behalf of Kevin Molloy that the condition of suspension preventing the appellant from working as a debt collector during the period of suspension of seven years was disproportionate. It was submitted that there was effectively a requirement for the appellant to 'disband' his business and that this constituted an undue interference with his constitutional right to work. The Court of Appeal rejected this argument thus:

> 18. The learned Circuit Court judge here pointed out that there is no system whereby the occupation or business of debt collecting is regulated in this jurisdiction and no doubt if there were such a regulatory process the appellant might have been subject to administrative sanction, assuming such process was analogous to that which exists in many walks of life regulated by statute. The appellant argued that the sentencing judge was unduly influenced by his negative views about the unregulated state of the such debt collection businesses. We think that in the light of the fact that these offences were committed in the course of his work of collecting a debt (if it was such) for [the relevant clients], in the absence of any other form of protection for the community, the public interest in ensuring that the law is observed when debts are sought to be collected and that those involved are of good character, the restriction was legitimate and in particular was proportionate to those aims. The position would be quite different if the offences in question were entirely unrelated to the appellant's work or did not touch on his integrity. It might or might not be appropriate in the event that there existed some regulatory system which might import of limitations or controls on the activities of individuals engaged on the assumption we have made as to such a regulatory system. We think that the fact of past criminality, including offences of dishonesty dealt with as recently as 2018, are of relevance also, although secondary factors.

10. A further appeal was allowed to this Court from that judgment in accordance with Article 35 of the Constitution as the issues raised as to the length of suspension and the condition that continued for seven years preventing Kevin Molloy from working as a debt collector met the criteria of raising an issue of general public importance. In turning to the submissions of the parties on the central issue, and an analysis of appropriate precedents with a view to determining sentencing bands, it is appropriate to set out the statutory penalties for harassment and for akin offences, for the conditional suspension of sentences, and to then reiterate the general principles of sentencing an offender.

Statutory basis

11. Section 10 of the Non-Fatal Offences Against the Person Act 1997 provides:

> (1) Any person who, without lawful authority or reasonable excuse, by any means including by use of the telephone, harasses another by persistently following, watching, pestering, besetting or communicating with him or her, shall be guilty of an offence.
>
> (2) For the purposes of this section a person harasses another where—

(a) he or she, by his or her acts intentionally or recklessly, seriously interferes with the other's peace and privacy or causes alarm, distress or harm to the other, and

(b) his or her acts are such that a reasonable person would realise that the acts would seriously interfere with the other's peace and privacy or cause alarm, distress or harm to the other.

(3) Where a person is guilty of an offence under subsection (1), the court may, in addition to or as an alternative to any other penalty, order that the person shall not, for such period as the court may specify, communicate by any means with the other person or that the person shall not approach within such distance as the court shall specify of the place of residence or employment of the other person.

(4) A person who fails to comply with the terms of an order under subsection (3) shall be guilty of an offence.

(5) If on the evidence the court is not satisfied that the person should be convicted of an offence under subsection (1), the court may nevertheless make an order under subsection (3) upon an application to it in that behalf if, having regard to the evidence, the court is satisfied that it is in the interests of justice so to do.

(6) A person guilty of an offence under this section shall be liable—

(a) on summary conviction to a fine not exceeding £1,500 or to imprisonment for a term not exceeding 12 months or to both, or

(b) on conviction on indictment to a fine or to imprisonment for a term not exceeding 7 years or to both.

12. While not applicable here, the offence has been amended by s 10 of the Harassment, Harmful Communications and Related Offences Act 2020 so that the definition section now extends to actions which "communicate by any means with or about the other person" and the penalty increased from seven years to ten years on indictment and summarily to a class A fine as well as 12 months' imprisonment. In terms of sentencing policy, such a general increase is an indication by the legislature to the courts that, henceforth and not retrospectively to an earlier crime, this offence needs to be taken seriously and the sentencing ought to reflect that. *Charleton and McDermott's Criminal Law and Evidence* (Bloomsbury Professional, 2nd edition, 2020) discusses *The People (DPP) v Renald* (unreported, 23 November 2001) CCA, whereby the accused sought leave to appeal a five year sentencing following a conviction under s15A Misuse of Drugs Act 1977. He argued that the presumptive ten-year minimum sentence was no longer relevant once circumstances had been identified which warranted a departure from that minimum. "The Court of Criminal Appeal disagreed, stating that even though the sentence of ten years was not appliable to the particular case, 'the very existence of a lengthy mandatory minimum sentence is an important guide to the Courts in determining the gravity of the offence and the appropriate sentence to impose for its commission.'" Harassment was the offence prosecuted in this case, as opposed to s 11 of the 1997 Act which proscribes the use of menaces in debt collection, possibly because the focus was less on the alleged debtor than on those associated with him. Section 11 provides:

(1) A person who makes any demand for payment of a debt shall be guilty of an offence if—

(a) the demands by reason of their frequency are calculated to subject the debtor or a member of the family of the debtor to alarm, distress or humiliation, or

(b) the person falsely represents that criminal proceedings lie for non-payment of the debt, or

(c) the person falsely represents that he or she is authorised in some official capacity to enforce payment, or

(d) the person utters a document falsely represented to have an official character.

(2) A person guilty of an offence under this section shall be liable on summary conviction to a fine not exceeding £1,500.

13. An akin offence is blackmail, where elements of threat and extortion also come into play. It is established by s 17 Criminal Justice (Public Order) Act 1994. This is essentially the same offence of blackmail contained within the Theft Acts 1968 and 1969 in England and Wales, and Northern Ireland respectively. There is no such offence in Scotland, but there is the similar offence of extortion; see generally for this type of crime, blackmail and menaces, *Charleton & McDermott's Criminal Law and Evidence* 13.136-13.145.

14. As a matter of history, the courts have approached the suspension of a sentence with conditions as essentially one of a pact as between the offender and the justice system: the court regards certain matters as essential to keep the public safe, including perhaps a specific victim; the offender agrees to strictly abide by such conditions and perhaps under probation supervision and thus is not required to serve time, or as much time, in jail.. An offender could reject a condition since it is part of the order of the court and an essential part of the procedure that he or she enter publicly in open court into a bond to keep the peace and be of good behaviour and to abide by the conditions imposed. Rejection of such conditions would mean that the court would have to rethink the sentence there and then, though instances are vanishingly rare. Most often an offender accepts a condition, subsequently to break it and to be brought back for the sentencing court to consider the activation of the suspended portion of the sentence. There is now a statutory basis which is s 99(3) of the Criminal Justice Act 2006. Section 99(2) makes an automatic condition of any order suspending a sentence that the person in respect of whom the order is made must keep the peace and be of good behaviour for the duration of the period of suspension. The power to impose further conditions is provided for by s 99(3):

(3) The court may, when making an order under subsection (1), impose such conditions in relation to the order as the court considers-

(a) appropriate having regard to the nature of the offence, and

(b) will reduce the likelihood of the person in respect of whom the order is made committing any other offence.

And any condition imposed in accordance with this subsection shall be specified in that order.

15. Other such provisions as to post-release supervision, reporting, conditions of conduct and penalties for breach occur: for example under Sex Offenders Act, 2001 – supervision and notification and section 16 orders; Part 9 of the Criminal Justice Act, 2006; and sections 26 and 26A of the Criminal Justice Act, 2007. While the general question is thus increasingly central to the proper sentencing of offenders, no comment is made as to these specific provisions, the language of which must follow the determination of the Oireachtas to mould appropriate and targeted provisions to deal with individual offences distinct from this one.

Fundamental principles of sentencing

16. The starting point for a sentence is the headline tariff, the sentence before any mitigating factors might reduce the sentence or cause any portion of it to be suspended; *The People (DPP) v Mahon* [2019] IESC 24, *The People (DPP) v M* [1994] 3 IR 306 at 315, *The People (Director of Public Prosecutions) v Farrell* [2010] IECCA 116, *The People (DPP) v Flynn* [2015] IECA 290. Mitigating factors are then

considered whereby, possibly, the culpability of the offender may be regarded as lesser than the sentence merited by the gravity of the crime, and the impact on the victim or society generally.

17. Apart from the work being currently undertaken by the Judicial Council, since the decisions in *The People (DPP) v WD* [2008] 1 IR 308, [2007] IEHC 310, approved of in principle in *The People (DPP) v Adam Keane* [2008] 3 IR 177 as to rape sentencing bands or precedents, and *The People (DPP) v PH* [2007] IEHC 335 as to sexual violence reported decades after perpetration, a now substantial body of sentencing analysis has been set down as to relevant precedents by judicial decision.

18. Most recently, in this Court, manslaughter sentencing bands have been set out as to five general categories in *The People (DPP) v Mahon*, and as to rape and serious sexual violence, based on updating research done by judicial assistants, in *The People (DPP) v FE* [2019] IESC 85, revising *The People (DPP) v PH* and *The People (DPP) v WD*. In both *The People (DPP) v Fitzgibbon* [2014] IECCA 12 and *The People (DPP) v Ryan* [2014] IECCA 11, the Court of Criminal Appeal set out bands for assault causing serious harm and firearms offences. In *The People (DPP) v Casey and Casey* [2018] IECA 121 the Court of Appeal provided guidance as to sentencing bands in residential burglary cases and in *The People (DPP) v O'Sullivan* [2019] IECA 250 it revised the sentencing bands for assault causing serious harm.

19. The focus from counsel for the prosecution staying silent in sentencing, apart from presenting the evidence and any victim impact statement, has necessarily shifted. Little sense arose from a lack of submissions as to sentence to the trial judge followed by a prosecution appeal asserting an unduly lenient sentence under s 2 of the Criminal Justice Act 1993. Thus, guidance, by way of a submission as to what band a sentence falls into is expected at trial stage; *The People (DPP) v Z* [2014] 1 IR 613. In *The People (DPP) v Fitzgibbon (No 2)* [2014] 1 IR 627, Clarke J for the Court of Criminal Appeal emphasised the role of the prosecution in making such a submission, which is not to demand a particular sentence. In the *Ryan* case, through Clarke J at paragraphs 3.1 and 3.2, the Court of Criminal Appeal established the practice as law, the practice already existing. It is not out of date to regard the judiciary as acting in the absence of guidance. To this prosecution submission, the accused can, and invariably does, reply.

Appreciation of the view of the sentencing judge

20. A central effect of this development has been to structure the hearing of a sentence at trial and to bring clarity to the legal analysis of wrong, harm, mitigation and what are the just deserts applicable to the offender. Thus, since sentences should only be overturned on appeal on the basis of an identification of a clear error of principle, certainty and structure have clarified where a sentence properly ought to lie. It is not the function of this Court, or any appellate court, to substitute a view since the jurisdiction of review is solely based on the identification of an error. In addition, it should be always borne in mind by an appellate court that the sentencing judge has advantages which involve him or her being in court, hearing perhaps victim evidence and mitigation evidence live and assessing that testimony as to its impact and of seeing and adjudicating on a live experience where the court has an appraisal which differs from the paper exercise conducted on appeal. Thus, a measure of appreciation is to be given to the approach of the sentencing judge in addition to the fundamental requirement that unless an identifiable error of principle enables the reanalysis of the circumstances, a sentence is not to be altered on appeal. Without that measure of appreciation, without the identification of an error in principle as to the trial judge's approach, an appeal ceases to have the attributes of an appeal and may be allowed to become instead a double sentencing hearing, which is not the approach mandated by the Constitution and the law; *The People (DPP) v Mahon*, *The People (DPP) v FE*.

Fundamental principle

21. As to approaching the difficult issue of imprisonment, fine, community service or the suspension of all or part of a sentence, the fundamental principles remain those set out by this Court in *The People (DPP) v M* [1994] 3 IR 306. At page 317, Denham J referenced as central that the "nature of the crime, and the personal circumstances of the appellant, are the kernel issues to be considered and applied in accordance with the principles of sentencing". This approach she described as "the essence of the discretionary nature of sentencing". Thereafter, at pages 316-318, there is a reiteration of the correct approach:

> Sentences should be proportionate. Firstly, they should be proportionate to the crime. Thus, a grave offence is reflected by a severe sentence. … However, sentences must also be proportionate to the personal circumstances of the appellant. … the general impact on victims is a factor to be considered by the court in sentencing. … Sentencing is a complex matter in which principles, sometimes being in conflict, must be considered as part of the total situation. Thus, while on the one hand a grave crime should be reflected by a long sentence, attention must also be paid to individual factors, which include remorse and rehabilitation, often expressed *inter alia* in a plea of guilty, which in principle reduce the sentence. … In contemplating the sentences it is appropriate to consider the offences and their nature and their circumstances, but this is not done for the purpose of determining whether the appellant should be incarcerated for the future so as to prevent him committing further offences: he is sentenced solely for the offences before the court.

Submissions of the applicant

22. In accordance with the practice established in 2020, prior to the appeal hearing a statement of the case with questions set for the attention of the parties was issued by the Court. Most germane are the responses of Kevin Molloy and the Director of Public Prosecutions to question 5. First, Kevin Molloy:

> Q. 5. As regards the length of the suspension, is there any submission from either side as to the point at which the length of the suspension may become:
>
> (a) The negation of that suspension by reason of being more harsh than a determinate and non-suspended sentence?
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> (b) A suspension of such duration that it may undermine public confidence in the alternate to custodial disposal that a suspended sentence represents?
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> A. (a) The length of a suspended sentence should be both balanced and proportionate to the length of the original custodial sentence envisaged. The primary purpose is to encourage rehabilitation by both showing the defendant that justice can be tempered with mercy and that there are consequences for any defendant who spurns the opportunity of a second chance. Once the length of that suspension significantly exceeds the suspended period, it risks becoming so remote from the original sentence that it becomes a separate entity, which, we submit is not permissible in law.
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> (b) On the relationship between the duration of a suspended sentence and public confidence, we submit that the more any suspended sentence strays from the statutory purpose then the greater is the risk that it will lose public confidence. Section 99 of the Criminal Justice Act 2006 creates a cohesive and balanced scheme for the suspension of sentences in whole or in part. While it declines to fetter the discretion of the court in terms of duration, we submit that the length of any such suspension should be proportionate to the sentence to which it is related, otherwise it risks straying from its statutory purpose. If

it is so disproportionate in length to the original intended sentence, as we submit has occurred in this case, then it not only diminishes the efficacy of the scheme but it risks undermining public confidence in the measure in its entirety.

23. The Director of Public Prosecutions responded thus:

When considering both parts of this question, it must be recalled that in Ireland, unlike most other countries, there is no limit to the length of a determinate sentence that may be suspended and no limit (or formal limit in any event) to the length of time for which it may be suspended. This is clear from s. 99(1) of the Criminal Justice Act 2006. Further, and as appears from the same section, a very wide range of conditions may be attached to a suspended sentence. Every such sentence is conditional on the offender keeping the peace and being of good behaviour throughout the operational period (including any period of imprisonment in the case of a part-suspended sentence). Additionally, however, under s. 99(3), a court may impose one or more further conditions that it regards as (a) appropriate having regard to the nature of the offence, and (b) will reduce the likelihood of the offender committing any other offence. A court is certainly not at large in imposing additional conditions; any such conditions must be compatible with the two factors set out in s. 99(3). Even so, the combination of all these features of the suspended sentence as it operates in this jurisdiction means that, in a given case, it may be an onerous penalty.

Empirical research conducted in other jurisdictions has shown that offenders with experience of incarceration and other sanctions do not invariably rank imprisonment as the most severe sanction. In one leading American study in which 50 inmates in a Minnesota facility were interviewed, it was found, for example, that inmates ranked five years of intensive probation supervision as harsher than one year's imprisonment but not as harsh as three years' imprisonment. Five years in prison was judged harsher than any other sanction. See Joan Petersilia and Elizabeth Piper Deschenes, "What punishes? Inmates rank the severity of prison vs. intermediate sanctions" (March 1994) 58 Federal Probation. Much more recently, research has highlighted the punitive nature of continuous community-based supervision by means of electronic monitoring and satellite tracking systems. See, for example, Kate Weisburd, "Punitive Surveillance" (2022) 108 Virginia Law Review (forthcoming, but available on SSRN – Social Science Research Network).

Turning then to the question at Paragraph (a), assessing the comparative severity of any two penalties can be notoriously difficult, and the difficulty is well recognised. For instance, there tends to be an assumption that any non-custodial penalty, whether it be a fine, a requirement to remain under probationary supervision for a defined period, an unpaid work requirement or, indeed, a suspended sentence is, by definition, more lenient than any term of immediate imprisonment. Yet, this may not invariably be the case. Much would depend, on the one hand, on the duration of imprisonment, the experience of the individual offender and the conditions of custody, and on the other, the onerousness or otherwise of the alternative.

It is theoretically possible that a very long suspended sentence to which onerous conditions were attached might be more severe than a short determinate sentence. This, in turn, underscores the importance of adhering to the principles set out in R v O'Keefe [1969] Q.B. 29 and R v Mah-Wing Cohen (1983) 5 Cr. App. R. (S.) 347 that a suspended sentence should not be imposed unless the offence is deemed to merit a custodial sentence in the first place and that a custodial sentence should not be made longer simply because it is being suspended. Both principles are accepted in this jurisdiction. Ordinarily, however, a suspended sentence will be less onerous than a sentence of immediate custody, even if both the specified custodial term and the operational period are of considerable duration.

The offender remains at liberty and will not, in the case of a fully suspended sentence, be required to serve any time in custody, with all the hardship that would entail, if he or she abides by the conditions of suspension. In many, perhaps most, cases, those conditions do not demand of the offender anything more than is ordinarily expected of all members of society (e.g. to keep the peace, be of good behaviour, and not commit any further offence). Or, the offender may be required to do or refrain from doing something which is perfectly reasonable in the circumstances (e.g. not communicate with the victim of the offence).

Paragraph (b) of this question asks if the duration of suspension might be such as to undermine public confidence in the suspended sentence as an alternative to immediate custody. The duration of suspension, which we take to refer to the operational period, might conceivably be subject to criticism for being too short to reflect either the gravity of the offence or the offender's perceived risk of re-offending. Or, it might be criticised for being too long in the sense that the gravity of the offence and the personal circumstances of the offender did not warrant leaving the offender at the risk of immediate custody for such a protracted period. Any assessment of the justice and proportionality of operational periods for this purpose must, of necessity, be fact specific. A suspended sentence can serve any of the recognised penological purposes, namely, desert, deterrence (general and specific), rehabilitation and incapacitation. More fundamentally, it can serve to protect the public or individual members of the public from future harm – which is the ultimate objective underpinning several of the rationales just mentioned. It is submitted that the length of the operational period must be judged according to the penal purpose(s) that it may serve, considered in the light of the nature of the offence and the circumstances (including the prior record) of the offender. Where, for example, an offender has, by his conduct and record, shown him/herself to be a person who is at risk of re-offending, and especially where that future offending may be of a serious nature, a significant operational period with appropriate conditions attached may well be appropriate where with a fully or part suspended sentence is imposed. This is reflected in s. 99(3) of the Criminal Justice Act 2006 which, as noted earlier, permits a court to impose such additional conditions as will "reduce the likelihood of the person in respect of whom the order is made from committing any other offence."

Bands in demanding with menace and akin offences

24. The starting point for sentencing is the maximum offence allowable and a consideration of what circumstances would constitute the worst tier of the commission of the offence in question. Thereafter, the headline sentence is perhaps reduced provided there is mitigation and the circumstances of why the offender is less culpable should be recited in the judgment imposing sentence together with any aggravating circumstances, or factors moving a case into a particular sentencing band. Guidelines are a flexible means whereby the parties, prosecution and accused, their advisors and the victims of offences will establish parameters within which a sentence may be expected. As yet, and it may not happen, we have not moved to a system of a sentencing council with more rigid guidelines whereby, as in England and Wales, a judge must report any departure. Rather, a basis of approach is outlined, the principles as to gravity and consequences set out, the duty of counsel for the prosecution to submit as to what band may apply and the circumstances warranting the imposition of a range of sentences is laid out. This requires recognition of existing authorities, the common law being based on precedent, persuasive analysis from other jurisdictions, as to how culpability may properly be judged and consequences rationally categorised, where not present within our system, and the analysis of a range of authorities as to how a tiered sentencing system is thereby established.

25. The point of a sentencing synthesis is to gather such authorities as are available and to make sense of the underlying rationale whereby judges tend towards similar sentences, meaning within

similar bands, based on common factors. Hence, what brings an offence into the lowest category of offending, what is ordinary and what is more serious should be readily identifiable, as should the factors pointing in that regard. Where there is a more complex range of offending, as in *FE* for rape or *Mahon* for manslaughter, a wider series of bands may be identifiable. But underlying these, what needs to be discovered from the approach of judges at appellate and at trial level, is the rationale, the reasoning whereby an offence may be regarded as capable of lenient disposal or as deserving of condign punishment or, while always serious, as being within the general category of that kind of offending. As in Northern Ireland, this should not ever be a mechanistic approach, but rather should seek to find basic factors whereby an offence is more or less serious and the reasons underlying the approach; *R v McCormick* (2015) NICA 14 [7]; *R v McCaughey & Smith* (2014) NICA 61 [22]; *R v McKeown, R v Han Lin* (2013) NICA 28 [24-25].

26. There is yet to exist any regulatory framework for the debt collection industry. Such a framework does exist in the United Kingdom by way of the Consumer Credit Act 1974. The business of third-party debt collection in England and Wales has led to the formation of professional associations such as the Credit Services Association which imposes strict guidelines. There does however exist a degree of protection for debtors by way of s 11 in the Non-Fatal Offences Against the Person Act 1997 which makes it a criminal offence for debt collectors to deploy practices designed to cause alarm, distress or humiliation to the debtor. Akin offences may also influence the approach. While blackmail is more serious, it is also clear that menaces can undermine both the entitlement of the victim to be left in peace, since court proceedings are the ultimate and only legitimate way to collect a debt, and can cause grave distress to victims. Hence, from England and Wales, the range is illustrated by three cases. In *R v Kelly (Lloyd Valentine)* (1993) 14 Cr App R (S) 347, the accused, acting as a debt collector commissioned to recover a debt of around £1,000, received a sentence of two years' imprisonment, which was upheld on appeal. He visited the victim with two formidably built and menacing men and violence was threatened. A more serious case was *R v Mc Grath (Sicarius Anthony Mark)* [2017] EWCA Crim 1945, a sentence of seven years was not appealed, with additional time for controlling prostitutes. There, a person indebted to the accused was threatened in prison and the street where he lived was targeted by criminal damage. In *R v Baybasin (Abdullah)* [2014] EWCA Crim 2536, the leader of a London gang that operated both a protection racket and a debt collecting service for unregulated loans to ethnic businesses, a sentence of twelve years for blackmail was imposed. The common factor in both *Baybasin* and *McGrath* was the thought-through, professional and directed nature of the activities coupled with the high level of menaces accompanying the demands.

27. Earlier cases include *R v Christie (Paul Andrew)* (1990) 12 Cr App R (S) 540 where the headline sentence was 30 months' imprisonment for blackmail in the form of a threat to make a false accusation reduced to two years. The accused saw a photograph of a man who was a stranger to him in the local paper and wrote to him demanding £5000 under the threat to expose him as a homosexual. In the end, the sentence was of two years. Lloyd LJ regarded this as not in the worst category:

> The present case is not in the most serious class of blackmail for this reason. The appellant, as I have already said, had no reason to suppose that Mr. P. was a homosexual, nor is he in fact a homosexual. The mental anguish in this case was therefore much less than it sometimes is. On the other hand, the offence was carefully researched and cleverly executed.
>
> There is a social enquiry report before us which sets out the background to the case and there is a prison report in which it is said that the appellant has shown very little remorse since he has been in prison.

28. A similar case of blackmail, to which the accused pleaded guilty was *R v Smith (Jonathan David)* [1993] 14 Cr App R (S) 786 where he planted an envelope under the windscreen wiper of the victim's car. This contained photographs of him going to a massage parlour and demanded £5000 for the negatives, and a threat to disclose photos to the victim's wife. There were also phone calls to the victim. The sentence was 30 months' imprisonment and blackmail in the context of what was true, as opposed to untrue, was regarded as more undermining of the victim. In *R v Read (David Jonathan)* [1996] 2 Cr App R (S) 240, another blackmail case, a clergyman was written to asserting homosexuality. The eventual sentence was 21 months because of strong mitigating factors. See also *R v John Williams Daniels* [2002] 1 Cr App R (S) 100, and *R v Hutchinson (Alan)* [2018] 2 Cr. App. R. (S) 5. The latter involved a two-week campaign of blackmail inspired, as are so many cases of harassment and blackmail, by a grudge, here a fitness to practice issue as a dentist. This was a six-year sentence as the culpability and the impact on the victim was high, notwithstanding the short duration. The approach in that jurisdiction emerges as a consideration of culpability and harm and then moving on into an assessment of any mitigation.

29. In that jurisdiction, England & Wales, the Court of Appeal initially used fraud sentencing as indicators for blackmail or demanding with menaces cases. Factors which the court has indicated may warrant a longer sentence being imposed (4 to 7 years imprisonment) include:

a) A highly sophisticated plan – carefully researched, cleverly executed;
b) Little remorse is shown;
c) The subject matter is true;
d) The sum of money sought is significant.;

While factors which may reduce the length of the sentence to around 2 years include:

a) When the subject matter of the blackmail is not true – it is less likely in those circumstances to cause a victim anguish and it is also less likely that the victim will succumb to the pressure;
b) Personal mitigating factors such as depression or stress.

30. In this jurisdiction, there have been four relevant precedents. In *The People (DPP) v Doherty* [2019] IECA 350, the accused led a campaign of leafleting, of emailing under false names and of other means against a public servant; full details are at [2020] IESC 45 and involve a concerted and structured campaign of harassment which lasted several months. The trial judge assessed the offence as lying within the mid-range for the offence of harassment and therefore the headline sentence of four years' imprisonment was identified. Judge Greally said that she would give the accused credit for the following factors: her lack of previous criminal convictions, her impressive educational background; her accomplishments in her career as a Garda; her historic and ongoing psychological difficulties; the character references which spoke to her kindness; the recognised difficulty experienced by Gardaí when serving prison sentences; the consequences of this conviction for her career; and her stable and supportive relationship. There had been no recurring of the offending since her arrest and she was at a low risk of reoffending. In those circumstances, a sentence of three years' imprisonment was imposed.. Another case was *The People (DPP) v Doolin* [2020] IECA 231 which involved the harassment of six women via social media and the internet over a period of half a decade and which took the offending into the upper range for sentence. The accused was sentenced to five years' imprisonment with two years suspended and his appeal was dismissed. He had pleaded guilty and shown remorse by apologising and he had no previous convictions. The fact that there were six victims was an aggravating factor. Some of the complainants had been placed in fear of physical harm. *The People (DPP) v Eid* [2010] IECCA 24 was a blackmailing case where the circumstances involved the accused demanding €100,000 from the victim in exchange for not killing the victim and two members of his family. The appellant was

sentenced to six years and the Court of Criminal Appeal held that this was not an error in principle and indeed commented that it may well have been the case where a higher sentence would not have been interfered with. In *The People (DPP) v Carraher (no 2)* [2018] IECA 170 the accused, against a background of family law proceedings, harassed first of all his estranged wife, leading to a sentence of 6 months and then, asserting a crime against her, proceeded to harass the Garda sergeant who he decided was not sufficiently active in pursuing his allegations. This merited a headline sentence of five years. A flavour of why is to be gleaned from the sentencing remarks in *Carraher* where the trial judge is recorded as saying:

> Finding firstly that the telephone wasn't effective enough because he was being met with people who could answer him, he reverted to the anonymity of the one-way traffic of the internet, and there he sat down, he is an educated man, not troubled with the use of language, or its concept and meanings and contrived to put together internets that suggested the most grievous wrong possible to a member of An Garda Síochána, namely (that he was) corrupt; to a husband and father, namely that he was unfaithful, all based on absolutely no evidence whatsoever. I've listened at length to [the accused's] explanations about where he queried evidence that was assembled for him, and in particular, this great cause he has of the length of telephone records on the one hand and telephone content on the other, and how he had his great ground to build his cause, to build his case, to build his campaign, to smear a good name. Not a whit of substance to it whatsoever, but of course [the accused] is entirely indifferent to any of that. He has a mission, his mission to do as much damage as possible in the furtherance of the cause of his own self-interest.

31. From New Zealand a series of cases indicate a similar approach across a comparative analysis of jurisdictions. The facts in *R v Duckworth* [1992] 3 NZLR 322 involved blackmailing the Coca-Cola corporation with claims that its soft drinks had been contaminated. Here, the accused was sentenced to five years' imprisonment, the maximum for that offence at the time being seven years. Among the actions were that he had placed a supposedly contaminated bottle in a retail store in a position where it was unlikely to be purchased before it was removed. He renewed the threats from time to time. He was fully co-operative when caught and pleaded guilty. The offence warranted a starting point at or around the maximum. *R v Kerr* [2016] NZHC 512 was another case of blackmail. Here the accused sent two blackmail letters containing sodium fluoroacetate to two separate organisations and threatened that infant formula would be contaminated with it if a particular product was not banned. There would be financial benefit for himself if the substance were to be banned. Venning J, referring to *Duckworth*, noted that the maximum was now 14 years, and felt that the starting point was close to that maximum. Mitigating circumstances reduced the sentence to 11 years and six months.

32. Striking is how close this approach in the assessment of seriousness and the importance of assessing the impact on the victim is with the approach adopted in England and Wales. Harassment is there an offence under the Protection from Harassment Act 1997. The behaviour must occur on more than one occasion. Racial motivation is separately categorised. Harassment involving putting people in fear of violence is a more serious offence with a maximum sentence of 10 years imprisonment or 14 years imprisonment if racially or religiously aggravated. The Sentencing Council of England and Wales guidelines set out different levels of culpability and bear quoting since a similar approach emerges from the authorities already quoted:

> A – Very high culpability.
>
> The extreme nature of one or more culpability B factors or the extreme culpability indicated by a combination of culpability B factors may elevate to category A.
>
> B – High culpability.

Conduct intended to maximise fear or distress.

High degree of planning and/or sophisticated offence.

Persistent action over a prolonged period.

Offence motivated by, or demonstrating, hostility based on any of the following characteristic or presumed characteristics of the victim: age, sex, disability, sexual orientation or transgender identity.

C – Medium culpability.

Cases that fall between categories B and D, and in particular;

Conduct intended to cause some fear or distress.

Some planning.

Scope and duration of offence that falls between categories B and D.

D – Lesser culpability.

Offender's responsibility substantially reduced by mental disorder or learning disability.

Conduct unlikely to cause significant fear or distress.

Little or no planning.

Offence was limited in scope and duration.

33. Then the level of harm is assessed by weighing up all the factors in the case.

Category 1.

Very significant distress caused to the victim.

Significant psychological harm caused to the victim.

Victim caused to make considerable changes to lifestyle to avoid contact.

Category 2.

Harm that falls between categories 1 and 3, and in particular:

Some distress caused to the victim.

Some psychological harm caused to the victim.

Victim caused to make some changes to lifestyle to avoid contact.

Category 3.

Limited distress or harm caused to the victim.

Sentencing bands outline

34. The England & Wales Sentencing Council then sets out a range of tariffs in tabular form. There is insufficient material to go beyond general remarks here and in any event the approach in this jurisdiction is bordered by respect for the trial judge, the requirement before any change on appeal of finding a genuine error of principle whether the appeal is by the accused or the prosecution, and the setting of guidance whereby sentencing and appellate judges may have a map as to their

approach. By way of summary, and for the purpose of guidance, it is possible to state the following: a consideration of the maximum sentence for harassment or menaces or blackmailing type of offences should involve a consideration of structured and thought-through planning that aims to cause real distress to the victim, most especially where what is involved is not an aberration brought about by severe emotional distress, but a prolonged campaign. In that regard what must be borne in mind is that these kinds of offences are very serious for victims and become more so where personal factors are identified by the perpetrator so that the victim is leant on in a way which undermines the integrity of their personality. This kind of conduct has the effect of pushing emotions to the edge of manageability and of shaking what may be, or what may thereby become, an already fragile emotional state. Sentences of seven years may be appropriate as a headline tariff and worse cases involving gang action for cynical gain may tend more towards the maximum.

35. Many cases in the medium category arise from personal obsessions where, while the offender is culpable, a lack of planning may emerge that demonstrates that the offender is driven by emotion rather than thinking through a campaign and carefully putting the pieces of undermining the victim in place. Nonetheless, thought through or driven by emotion, there are still victims who are likely to be deeply hurt; hence, these offences are serious and whether the offender is emotionally driven or not, where a victim has to put up with repeated encounters, threats, messages or interference with home or workplace amenities, this is serious and a consideration of beginning at four years' imprisonment and upwards is appropriate.

36. Where less distress is caused to the victim, where the campaign can hardly be so characterised because of lack of thought and planning, where the timespan is especially limited and where personal attributes of the victim are not sought out and exploited, perhaps silly lies or fantasies being invented and projected onto her or him instead, this is a lesser category. But, the impact on the victim should always be considered since the protection of individuals from harm is the very heart of the criminal justice system and factors such as failing to desist when asked or reverting to such conduct can bring the general sentence of two and a half years as a starting point towards the medium category. These are all headline sentence observations. It is possible that genuine remorse, cooperation and the offender suffering under personal emotional trauma can lessen the gravity of such offences but what should never be lost sight of, and responded to, is what the victim of such offences has been put through in consequence of, as all of these cases demonstrate, no fault of their own. Fundamentally, this kind of conduct is serious.

Conditions of suspension of sentences

37. A condition, if it is to be effective when tagged onto a sentence so that the offender serves a certain time in prison and is then conditionally released, or where a sentence is wholly suspended with conditions, must relate to the offence; *The People (DPP) v DW* [2020] IECA 145 (paras 62-3). Primary in purpose of conditions imposed in the context of a suspended sentence is to reduce the likelihood of any reoffending or to curb the offender's inclinations by such measured requirements that the temptation to reoffend is markedly lessened or removed and, furthermore, that the victim is made to feel protected. Section 99(4) of the 2006 Act informs the analysis. This provides a further power to enable the court either of its own motion or upon application to order that the person who is the subject of a sentence that is suspended in part to cooperate with probation services, undergo addiction treatment or enter into any other course of therapy or counselling as may be approved by the court. Read in context, these provisions, which enable conditions to be imposed with suspended sentences, address the root cause of the behaviour that underlies the particular offending. These are not to be characterised, however, as merely rehabilitative as nothing in the legislation prohibits a condition from imposing an appropriate burden on the accused, provided that is relevant to rehabilitation and to the protection of victims. In that regard, the analysis of O'Malley, in *Sentencing Law and Practice* (3rd edition, Dublin, 2016) at 22-26 is, as always, thoughtful:

> Suspended sentences, like conditional discharges, should be subject only to conditions that are lawful, rational and non-arbitrary. Conditions should conform, first and foremost, with the principle of legality; they should be clearly expressed and indicate precisely what the offender is required to do or refrain from doing. A requirement, for example, that the offender must stay away from the centre of Dublin for a year would scarcely comply with this standard. It has been suggested that conditions of suspension fall into two broad categories, those that aim to control or restrict the offender's behaviour and those that aim to change the offender's behaviour through some kind of intervention. Both of these objectives are perfectly legitimate and feature quite routinely in suspended sentences.

38. It may also be wrong to impose a suspended sentence with conditions which is longer than merited by a custodial sentence. Thereby, a sentence becomes imbalanced and beyond the just deserts of the offender and the vindication of the protection of the public and the victim; *R v Cohen Mah-Wing* (1983) 5 Cr. App. R. (S.) 347 at 348. Hence, at 22-24, O'Malley's opinion is that the suspended proportion of a sentence should not be significantly longer than the term served. The Law Reform Commission Report on Suspended Sentences LRC 123-2020, at paragraphs 8:14-16, considers that there may be dangers whereby the term served is exceeded by the suspended term with conditions, reasoning that the length of the served and the suspended portions are part of the punitive aspect of the sentence; citing *The People (DPP) v Stronge* [2011] IECCA 79.

39. While there are constitutional issues potentially arising in controlling individual conduct beyond the scope of an appropriate sentence the conduct of an offender, these considerations are not engaged where a sentence is appropriately balanced. *The People (DPP) v DW* involved a condition that the accused stay away from the injured party and not make contact or cause anyone else to make contact or go anywhere near her home for a period of 30 years. The Court, at [75], refers to Murray J's remarks in the earlier case of *The People (DPP) v Alexiou* [2003] 3 IR 513

> The court is only concerned with the circumstances of this case and not with an abstract review of the kind of conditions which can be imposed when a sentence is suspended. However, for the purposes of this case it may be said that conditions which are attached to suspended sentences usually reflect either something which the accused is bound to do in any case, such as to be of good behaviour and observe the law, or something which he has told the court he intends or wishes to do. This approach undoubtedly reflects a prudent concern on the part of the courts to avoid the risk of imposing a condition which would be tantamount to imposing a penalty not envisaged by the law. This could arise in the case for example of a non-national who was habitually resident in the State and in which he had worked for many years and raised his family. Where the only penalty prescribed by law was a fine or imprisonment, a suspended sentence conditional on such a person leaving the State against his express wishes, could be considered so extraneous to the penalties imposed by law and beyond the discretionary powers of sentencing vested in a trial judge. If, in such a case, the nature of the offence appeared to the judge to be one which called in question the appropriateness of the accused being permitted to reside in the country, then he would have available to him the statutory power to make a recommendation to the Minister for Justice, Equality and Law Reform that he be deported. It would then be for the Minister, in his executive discretion, to decide on that matter.

40. At [84] of Edwards J's judgment for the court, it was, in contrast, stated:

> However, in the case of suspended sentences, the conditions attaching to the court's willingness to suspend the sentence may sometimes impinge on the subject person's constitutional rights in a non-distributive way. Where that arises, the impingement is not just to do with how much punishment is deserved or appropriate in the case. Rather, the concern that has given rise to the condition may be based on some other perceived need

> such as protection of the public at large or of some class of persons or indeed of an individual; or a perceived need to incapacitate the offender in terms of his ability to commit further crime in certain circumstances. In such circumstances, although the condition may have some punitive effect, the legitimate aim to which the measure is addressed is not primarily penal. Arguably it is therefore inappropriate to consider its proportionality as though it were primarily penal. The words "punitive" and "penal" are used here to import aims consonant with retribution, deterrence, and the promotion of reform and rehabilitation, which represent the principal objectives of a punishment lawfully imposed in the course of a sentencing in this jurisdiction. The issue in such circumstances is not solely whether that measure, to the extent that it has punitive effect, is deserved or appropriate as a lawful punishment (although it may be condemnable on the grounds of having a disproportionately punitive effect alone); rather it may be whether that measure is lawful as a punishment at all, and in so far as it is a measure addressed to another legitimate aim or aims, such as individual or public protection, or incapacitation in the public interest, and which may over-ride constitutionally protected rights in doing so, whether it is a proportionate measure in terms of the constitutional doctrine of proportionality. Such a condition might potentially impinge on the individual's constitutionally guaranteed right to freedom of expression, or freedom of association, or to the enjoyment of family life, or privacy, or bodily integrity, or right to work, amongst other possibilities. To take a perhaps extreme hypothetical example, if a court were to purport to suspend the sentence of a sex offender on condition that he submit to chemical castration, it would manifestly have the potential to impinge on the subject person's right to bodily integrity and would raise Heaney type proportionality concerns. (It would also raise an issue about using such a condition to, in effect, impose a punishment presently unknown to Irish law.) It seems to us that in such a case it would be appropriate for the sentencer at first instance, or any appellate court asked to review the sentence, to subject the proposed condition to a proportionality test similar to that propounded in Heaney to determine its lawfulness before proceeding to impose it or, in the appeal scenario, to uphold it.

Proportionality and balance

41. Were the collection of debt, outside the regulated confines of the work of financial recovery carried on by many solicitors firms, to be subject to a regulatory body, it might be expected that the accused in this case would not work again, perhaps ever but certainly for a significant period. This order is said to engage the right to earn a livelihood; *N.v.H v Minister for Justice and Equality* [2017] IESC 35, [2018] 1 IR 246. Further, it is submitted that conditions imposed must conform with the approach in *Heaney v Ireland* [1993] 3 IR 593. This analysis by Costello J, however, is in a different context, that of the right to silence. The restriction on the exercise of a right are such as "must relate to concerns pressing and substantial in a free democratic society. The means chosen must pass a proportionality test." Hence, those must:

> (a) Be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations
>
> (b) Impair the right as little as possible, and
>
> (c) Be such that the effect on the rights are proportional

42. Much has been made in submissions as to *Heaney v Ireland* but applicability to proportion within the analysis of sentence may be less than fully parallel. *Heaney* proportionality is not the same question as proportionality of a particular sentence. It concerned the right to silence, but the more general point is that *Heaney* enables a particular analytical model where legislation affects a constitutionally protected right. This is about rationality, principle and proportionality in

sentencing. Certainly, as considered in *The People (DPP) v Alexiou* [2003] 3 IR 513 and *The People (DPP) v Broszczack* [2016] IECA 121, such conditions of suspension should be proportionate and reasonable. That is a different consideration. Thus, in *The People (DPP) v Lee* [2017] IECA 152, the Court of Appeal upheld a condition of suspension that the offender, a recidivist burglar who had offended mainly in Laytown and Bettystown, would not enter those towns for a five year period without the prior written consent of the Chief Superintendent for the area. Conditions may be appropriate even though stringent if the balance of a sentence is maintained and if the protection of the public and victims requires that. More pertinent than a constitutional rights review, however, is the analysis of MacMenamin J in *Gilligan v Ireland* [2013] IESC 45, [2013] 2 IR 745 of sentencing powers. While that was in the context of a constitutional challenge to provisions requiring the addition of sentences to those already being served, where such offences occurred, as in that case while the sentence was operative, in that case while the offender was actually in jail, the remarks as to proportion are what more appropriately govern the proper approach to this matter:

> 34. One of the hallmarks of the exercise of judicial discretion in sentencing in the application of the overriding principle of proportionality. Does the section impermissibly prevent the judge from applying this principle?
>
> 35. By now, it is well established that the distributive principle of punishment under our law requires that, in general, every sentence must be proportionate to the gravity of the offence, and take into account the personal circumstances of the offender (see *Deaton*; *Osmanovic*; and *Lynch and Whelan v Minister for Justice*). Here, the term "proportionality" is used in the sense of the judicial task of striking a balance between the particular circumstances of the commission of the offence, and the circumstances of the offender to be sentenced.
>
> 36. In sentencing, proportionality only arises when the judge is exercising a judicial discretion as to sentence, within parameters laid down by law. Obviously, the principle does not arise in the case of mandatory penalties. The test of proportionality does however apply in every case where the offence, on conviction, carries a maximum, as opposed to a mandatory sentence. Thus, it arises in any situation where a trial court has a discretion as to the particular penalty to be imposed, within the statutory maximum sentence. Turning to the section under challenge, it is clear that the proportionality test is as applicable to offences committed by serving prisoners as to others. Were there to be a denial of the power to apply this principle, there might indeed be discrimination between one category of prisoner and another. But this is not the case.
>
> 37. It is not open to the appellant to argue that by virtue of his status as a prisoner serving a lengthy term of imprisonment, he will *ipso facto* be subject to a sentence which is either disproportionate or unduly severe. This is because the impugned section does not, in fact, mandate any standard or minimum level of punishment in any given case. For the purposes of a challenge to the constitutionality of the statute, it must be presumed, that any sentence imposed according to s. 13(1) must be proportionate. The constitutional duty of ensuring proportionality devolves on the judge in imposing sentences in these, as in any other categories of offences. If an offender considers that the sentences imposed are unduly severe, he or she will have the right to appeal to the relevant appeal court in order to ensure any error in principle is cured.

43. These principles set out by MacMenamin J precisely inform the approach. Principles of proportion and balance must thus be applied to this sentencing disposal overall. In terms of the outcome, there is no error of principle in considering this case to be in the margins as between the upper range of the median band and the lower reaches of the worst category of offending. This

must have been a dreadful experience for the victims. Further, the accused is necessarily burdened with the aggravation of a dreadful criminal record, the details of which are set out in the papers.

This case

44. The conditions are in the nature of a pact but one which is subject to review as, realistically, the offender could hardly refuse and in any event is within the disposal of the court. Arguments made and authorities cited as to the balance as between the suspended portion of a sentence, the conditions attaching, the operative part of the sentence and the necessity of weighing these elements so as to produce a proportionate result indicate that a suspension of seven years with conditions restricting the right to earn what would be a lawful livelihood if carried out in accordance with good conduct, demonstrate that such a condition erred in principle. There is good sense in a suspended portion of a sentence, an instrument of disposal used by the courts on a daily basis to bring offenders to good sense, possibly while under supervision. Unbalancing a sentence whereby the suspended tier greatly exceeds the operative time served would need special justification, lacking in this case. Imposing the condition to refrain from debt collection is part of the punishment when viewed from the standpoint of bringing home to the offender the grave consequences of any consideration of further menaces or harassment in the future. Continuing that for a time beyond the period of suspension would be lawful but only where there is balance in the approach. That would include any time spent in custody prior to sentence.

45. In all the circumstances, the sentence should be varied so that the condition will continue for the entire of the suspended portion of the sentence and for 18 months beyond that.